

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KONINKLIJKE PHILIPS ELECTRONICS
N.V., a Netherlands corporation,

Plaintiff,

vs.

KXD TECHNOLOGY, INC., et al.,

Defendants.

Case No. 2:05-cv-01532-RLH-GWF

ORDER

**(Motion to Compel Compliance with
Protective Order - #630)**

This matter is before the Court on Norcent's Motion to Compel Compliance With Protective Order, For Attorneys' Fees and Costs and For Limited Discovery (#630), filed on May 9, 2007; Philips' Opposition to Norcent's Motion to Compel Compliance with Protective Order, for Attorneys' Fees and Costs and for Limited Discovery (#640), filed May 29, 2007; and Defendants' Reply in Support of Norcent's Motion to Compel Compliance with the Protective Order, for Attorneys' Fees and Costs and for Limited Discovery (#648), filed June 11, 2007. The Court conducted a hearing in this matter on July 24, 2007.

BACKGROUND

On or about March 3, 2006, Defendants International Norcent Technology, Inc. and Norcent Holdings, Inc. ("Norcent") entered into a stipulated Protective Order (#195) with Plaintiff Koninklijke Philips Electronics N.V. regarding the production of confidential documents between the parties in this action. Pursuant to the Protective Order, Norcent produced confidential documents to the Plaintiff. On January 29, 2007, Plaintiff accepted Norcent's offer of judgment in this case. *Notice of Plaintiff*

1 *Koninklijke Philips Electronics N.V.’s Acceptance of Offer of Judgment* (#530). Pursuant thereto, the
2 Court Clerk entered a judgment in favor of Plaintiff and against the Norcent Defendants on January 30,
3 2007.

4 Paragraph 22 of the Protective Order (#195) provides in part as follows:

5 Within forty-five (45) days after the final resolution of this action, all
6 persons having received Confidential or Highly Confidential Material,
7 with the exception of the Court and its personnel, shall return such
material and all copies thereof to counsel for the Producing Party or shall
certify to such counsel that such material has been destroyed.

8 Plaintiff and Norcent are the only parties to the Protective Order. Paragraph 20 of the Protective
9 Order (#195) also provides that it does not govern any named parties in the action other than Philips or
10 Norcent and further provides that other parties “shall not have access to Confidential Material or Highly
11 Confidential Material, until they stipulate to the terms set forth herein or until the Court has entered a
12 protective order concerning their access and use of the same.” The Court is informed that the other
13 parties in this case have not stipulated to the terms of the Protective Order (#195). The Court has also
14 not entered an order granting any other party access to and use of Norcent’s confidential documents.
15 Since the settlement with Norcent, Plaintiff has also entered into a settlement agreement with the Amoi
16 Defendants. *See Notice of Settlement* (#661), filed on June 28, 2007. Plaintiff’s action remains pending
17 against the KXD and Sungale Defendants. Discovery is now closed.

18 On March 12, 2007, Norcent’s counsel sent a letter to Plaintiff’s counsel enclosing the payment
19 on the judgment and a satisfaction of judgment. Pursuant to the foregoing provision of the Protective
20 Order, Norcent’s counsel also requested that Plaintiff return all of Norcent’s documents, including
21 documents seized by Plaintiff pursuant to the t’s Temporary Restraining Order/Seizure Order (#39), no
22 later than March 17, 2007. *Motion* (#630), *Exhibit 16*. Norcent’s counsel sent a follow-up letter on
23 March 20, 2007 demanding return of Norcent’s documents. *Id.*, *Exhibit 17*. Plaintiff responded to
24 Norcent’s counsel’s second letter on March 22, 2007 by indicating that the return of documents
25 provision in the Protective Order did not apply to documents seized from Norcent pursuant to the
26 Court’s seizure order. Paragraph 8 of the Protective Order (#195), however, makes the materials seized
27 from Norcent subject to the provisions of the Protective Order. Plaintiff further contended that under
28 paragraph 22 of the Protective Order, it is not required to return Norcent’s documents until this case is

1 finally resolved as to all parties. Because the case remains pending between Plaintiff and the other
2 Defendants, Plaintiff asserted that it is not required to return Norcent's documents at this time.
3 *Plaintiff's Opposition* (#640), *Exhibit 1*.

4 Paragraph 11 of the Protective Order (#195) also provides:

5 Confidential Material and Highly Confidential material shall only be used
6 for purposes of this action and shall not be used in any other litigation,
arbitration or administrative or judicial proceeding.

7 In its Motion (#630), Norcent alleges that it has reason to believe that Plaintiff has violated this
8 provision of the Protective Order by using Norcent's Confidential Materials to identify Norcent's
9 customers and issuing subpoenas to them in another judicial proceeding. *Motion* (#630), page 3,
10 *Exhibits 6-15*. Norcent requests that Philips be ordered to comply with the provisions of the Protective
11 Order and cease using Norcent's confidential materials in other proceedings. Additionally, Norcent
12 requests that it be allowed to depose Plaintiff's counsel to determine the full extent of Plaintiff's use of
13 Norcent's Confidential Materials to determine whether contempt proceedings are appropriate. At the
14 hearing in this matter, Norcent's counsel requested, in the alternative, that Plaintiff should at least be
15 required to provide a sworn declaration that Plaintiff has not used Norcent's Confidential Materials in
16 violation of the Protective Order. In its Opposition, Plaintiff denies that it has used Norcent's
17 Confidential Materials in other actions and objects to Norcent's request to depose Plaintiff's counsel as
18 an improper invasion of attorney-work product.

19 DISCUSSION

20 The Court agrees with the authorities cited by Plaintiff's Opposition (#640) that a protective
21 order based on a written agreement between the parties is subject to the rules of contractual
22 interpretation, including that the agreement should be enforced in accordance with the ordinary
23 meaning of the language used in the agreement, *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 418
24 (N.D. Ill. 2006), and should be given a reasonable or common sense interpretation in light of its
25 purposes. *In re Dual-Deck Video Cassette Antitrust Lit.*, 10 F.3d 693, 695 (9th Cir.1993). In this case,
26 the Protective Order provides that Norcent's documents must be returned "[w]ithin forty-five (45) days
27 after the final resolution of this action." Broadly construed, this provision could reasonably be
28 construed to mean that Plaintiff is not obligated to return Norcent's documents until 45 days after this

1 action is resolved as to all parties. In this connection, Plaintiff cites the Court to Rules 68 and 54 of the
2 Federal Rules of Civil Procedure regarding final judgments. Although there is a judgment between
3 Plaintiff and Norcent, the action has not been finally resolved as to all parties.

4 On the other hand, it is also a reasonable construction of the Protective Order, in light of its
5 purposes, that Norcent's Confidential Materials should be returned to it with 45 days after there is a
6 final resolution of the action between the parties to the Protective Order, and Plaintiff has no further
7 legitimate need in this action for retaining Norcent's Confidential Materials. None of the other
8 defendants in this case have stipulated to the terms of the Protective Order to obtain Norcent's
9 Confidential Materials. Nor has the Court entered any other order granting them access to Norcent's
10 Confidential Materials. The Amoi Defendants have settled with the Plaintiff. The Court has not been
11 provided with any information that the KXD or Sungale Defendants have requested production of
12 Norcent's Confidential Materials.

13 In its Opposition (#640), Plaintiff asserts that "[s]ome of the documents produced by Norcent
14 are highly relevant to Philips' claims against the KXD Defendants and against Shanghai Hong Sheng"
15 and that "the documents produced by defendants in this action show that the defendants' infringing
16 activities are interrelated." *Opposition* (#640), p. 3. On the other hand, Plaintiff argued at the hearing
17 in this matter that Norcent's documents are voluminous and that it will be required to undertake an
18 undue burden to identify those Norcent documents which Plaintiff allegedly needs to retain to support
19 its claims against the remaining defendants. The Court finds Plaintiff's position that some of Norcent's
20 documents are relevant to its claims against the remaining defendants, but that it would be too
21 burdensome for Plaintiff to identify those documents, to be inconsistent. Plaintiff has had possession of
22 Norcent's Confidential Materials for a substantial time period such that it should have been able by this
23 point in the litigation to identify those Norcent documents that it needs to retain in regard to its claims
24 against the other Defendants. If Plaintiff intends to use Norcent's confidential documents in its case
25 against the remaining KXD and Sungale Defendants, then it needs to supplement its document
26 disclosures under Rule 26(a)(1)(B) and give the KXD and Sungale Defendants the opportunity to
27 execute the Protective Order (#195) in accordance with paragraph 20.

28 ...

1 The Court therefore finds that Plaintiff should return Norcent's Confidential Materials, other
2 than those that Plaintiff reasonably needs to retain in order to prosecute its claims against the remaining
3 defendants, in light of the language of the Protective Order and a reasonable interpretation of its
4 purposes,. Accordingly, the Court will give Plaintiff thirty (30) days from the date this Order is filed to
5 identify to Norcent's counsel those Confidential Materials that Plaintiff needs to retain and to return to
6 Norcent the remaining Confidential Materials that it does not need in regard to its claims against the
7 remaining defendants.

8 Norcent has not made a sufficient showing justifying its request to depose Plaintiff's counsel on
9 the grounds that the witnesses subpoenaed by Plaintiff's counsel in the other action could have only
10 been identified by Plaintiff through use of Norcent's Highly Confidential customer list. There may be
11 other legitimate means by which Plaintiff has identified those witnesses. At this point, however, the
12 Court can only speculate what those means were. By agreeing to paragraph 11 of the Protective Order
13 (#195), however, Plaintiff's counsel is not protected by the attorney work-product doctrine from
14 reasonable inquiry into whether they have violated the Protective Order by using Norcent's confidential
15 information in other litigation. Because Norcent appears to have raised a reasonable question as to how
16 these witnesses were identified, it is entitled to more than a mere denial by Plaintiff's counsel that it has
17 not used Norcent's confidential customer list to identify its customers in the other action. The Court
18 will therefore order Plaintiff's counsel to provide a written explanation to Norcent describing, in at least
19 general terms, the means by which it identified the witnesses to give reasonable assurance that
20 Plaintiff's counsel did not violate the Protective Order in this case. If Plaintiff's counsel's explanation
21 is unsatisfactory, Norcent can request further relief from the Court as may be appropriate. Accordingly,

22 **IT IS HEREBY ORDERED** that Norcent's Motion to Compel Compliance With Protective
23 Order, For Attorneys' Fees and Costs and For Limited Discovery (#630) is **granted**, in part, and
24 **denied**, in part, as follows:


25 1. Within thirty (30) days from the date this Order is filed, Plaintiff shall identify with
26 reasonable specificity to Norcent's counsel those Confidential Materials that Plaintiff needs to retain in
27 support of its claims against the remaining KXD and Sungale Defendants, and Plaintiff's counsel shall
28 return to Norcent the remaining Confidential Materials that it does not need in regard to its claims

1 against the remaining Defendants.

2 2. Within thirty (30) days from the date this Order is filed, Plaintiff's counsel shall also
3 provide a written explanation to Norcent's counsel describing, in at least general terms, the means by
4 which it identified the witnesses in the other action to give reasonable assurance that they did not
5 violate the Protective Order in this case. If Plaintiff's counsel's explanation is unsatisfactory, Norcent
6 can request further relief from the Court as may be appropriate.

7 3. Given the reasonable alternative interpretations of the Protective Order regarding the
8 return of documents, the Court does not find that an award of attorney's fees and costs is appropriate on
9 this motion.

10 DATED this 16th day of August, 2007.

11 
12 _____
13 GEORGE FOLEY, JR.
14 United States Magistrate Judge
15
16
17
18
19
20
21
22
23
24
25
26
27
28